

ORIGINAL



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BEFORE THE ARIZONA CORPORATION COMMISSION

**MARC SPITZER**  
Chairman  
**WILLIAM A. MUNDELL**  
Commissioner  
**JEFF HATCH-MILLER**  
Commissioner  
**MIKE GLEASON**  
Commissioner  
**KRISTIN K. MAYES**  
Commissioner

IN THE MATTER OF

FOUNTAIN CAPITAL MANAGEMENT, LLC  
c/o DAVID A. FAZIO  
3616 West Cortez  
Phoenix, Arizona 85029

INTERGROWTH FINANCIAL GROUP  
c/o ROGER ALVIN SANDE  
CDC #V06974  
P.O. Box 2210  
Susanville, California 96130

RICHARD A. FANDRICH  
11424 North 25<sup>th</sup> Avenue  
Phoenix, Arizona 85029

DAVID A. and DEBORAH FAZIO  
3616 West Cortez  
Phoenix, Arizona 85029

DONALD and HELEN ABERNATHY  
2323 North Central Avenue, #803  
Phoenix, Arizona 85004

STEPHEN A. and JANE DOE HILTBRAND  
2156 E. Estrella Circle  
Mesa, Arizona 85202

ROGER ALVIN SANDE  
CDC #V06974  
P.O. Box 2210  
Susanville, California 96130

Respondents.

DOCKET NO. S-03505A-04-0000

**RESPONDENTS STEPHEN A. AND  
CHERYL HILTBRAND'S ANSWER**

**JURY TRIAL DEMANDED**

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Arizona Corporation Commission

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JUN 11 2004

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*AR*

1 Respondents Stephen A. Hiltbrand and Cheryl Hiltbrand (collectively "Hiltbrand") hereby  
2 submit their Answer to the Notice of Opportunity for Hearing Regarding Proposed Order to Cease  
3 and Desist, for Restitution, for Administrative Penalties, of Revocation and/or Suspension, and for  
4 other affirmative relief (the "Notice"). Hiltbrand responds to the numbered paragraphs of the  
5 Notice as follows:

6 **I. JURISDICTION.**

7 1. Hiltbrand denies that the products at issue are securities and therefore denies that  
8 the Commission has jurisdiction.

9 **II. RESPONDENTS.**

10 2. Hiltbrand is without sufficient information or knowledge to form a belief as to the  
11 truth or falsity of the allegations in paragraph 2 and therefore they are denied in their entirety.

12 3. Hiltbrand is without sufficient information or knowledge to form a belief as to the  
13 truth or falsity of the allegations in paragraph 3 and therefore they are denied in their entirety.

14 4. Hiltbrand is without sufficient information or knowledge to form a belief as to the  
15 truth or falsity of the allegations in paragraph 4 and therefore they are denied in their entirety.

16 5. Hiltbrand is without sufficient information or knowledge to form a belief as to the  
17 truth or falsity of the allegations in paragraph 5 and therefore they are denied in their entirety.

18 6. Hiltbrand is without sufficient information or knowledge to form a belief as to the  
19 truth or falsity of the allegations in paragraph 6 and therefore they are denied in their entirety.

20 7. Hiltbrand is without sufficient information or knowledge to form a belief as to the  
21 truth or falsity of the allegations in paragraph 7 and therefore they are denied in their entirety.

22 8. Hiltbrand is without sufficient information or knowledge to form a belief as to the  
23 truth or falsity of the allegations in paragraph 8 and therefore they are denied in their entirety.

24 9. Hiltbrand admits that he resides at 2156 E. Estrella Circle, Mesa, Arizona 85202.  
25 Mr. Hiltbrand denies that he is a member of FCM.

26 10. Mr. Hiltbrand admits that he is married to Cheryl Hiltbrand. The remainder of the  
27 allegations in this paragraph require no response.

11. Hiltbrand is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations in paragraph 11 and therefore they are denied in their entirety.

12. This paragraph requires no response.

**III. FACTS.**

13. Hiltbrand admits that he is presently licensed to sell insurance and denies that he had an insurance license during the timeframe at issue in the Notice. Hiltbrand also admits that he was not registered with the Securities Division as a broker or securities salesman. He is without sufficient knowledge or information regarding the remaining allegations, and therefore denies them.

14. Hiltbrand is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations in paragraph 14 and therefore they are denied in their entirety.

15. The allegations in paragraph 15 of the Notice contain an incomplete and inaccurate statement of the facts, and are therefore denied.

16. The allegations in paragraph 16 of the Notice contain an incomplete and inaccurate statement of the facts, and are therefore denied.

17. The allegations in paragraph 17 of the Notice contain an incomplete and inaccurate statement of the facts, and are therefore denied.

18. The allegations in paragraph 18 of the Notice contain an incomplete and inaccurate statement of the facts, and are therefore denied.

19. The allegations in paragraph 19 of the Notice contain an incomplete and inaccurate statement of the facts, and are therefore denied.

20. The allegations in paragraph 20 of the Notice contain an incomplete and inaccurate statement of the facts, and are therefore denied.

21. The allegations in paragraph 21 of the Notice contain an incomplete and inaccurate statement of the facts, and are therefore denied.

22. Hiltbrand is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations in paragraph 22 and therefore they are denied in their entirety.

1           23.     The allegations in paragraph 23 of the Notice contain an incomplete and inaccurate  
2 statement of the facts, and are therefore denied.

3           24.     Hiltbrand denies each and every allegation in paragraph 24.

4           25.     Hiltbrand is without sufficient information or knowledge to form a belief as to the  
5 truth or falsity of the allegations in paragraph 25 and therefore they are denied in their entirety.

6           26.     Hiltbrand is without sufficient information or knowledge to form a belief as to the  
7 truth or falsity of the allegations in paragraph 26 and therefore they are denied in their entirety.

8           27.     Hiltbrand is without sufficient information or knowledge to form a belief as to the  
9 truth or falsity of the allegations in paragraph 27 and therefore they are denied in their entirety.

10          28.     Hiltbrand is without sufficient information or knowledge to form a belief as to the  
11 truth or falsity of the allegations in paragraph 28 and therefore they are denied in their entirety.

12          29.     Hiltbrand it without sufficient information or knowledge to form a belief as to the  
13 truth or falsity of the allegations in paragraph 29 and therefore they are denied in their entirety.

14          30.     Hiltbrand is without sufficient information or knowledge to form a belief as to the  
15 truth or falsity of the allegations in paragraph 30 and therefore they are denied in their entirety.

16          31.     Hiltbrand is without sufficient information or knowledge to form a belief as to the  
17 truth or falsity of the allegations in paragraph 31 and therefore they are denied in their entirety.

18          32.     The allegations in paragraph 32 of the Notice contain an incomplete and inaccurate  
19 statement of the facts, and are therefore denied.

20          33.     The allegations in paragraph 33 of the Notice contain an incomplete and inaccurate  
21 statement of the facts, and are therefore denied.

22          34.     The allegations in paragraph 34 of the Notice contain an incomplete and inaccurate  
23 statement of the facts, and are therefore denied.

24          35.     The allegations in paragraph 35 of the Notice contain an incomplete and inaccurate  
25 statement of the facts, and are therefore denied.

26          36.     Hiltbrand is without sufficient information or knowledge to form a belief as to the  
27 truth or falsity of the allegations in paragraph 36 and therefore they are denied in their entirety.

1           37.     Hiltbrand is without sufficient information or knowledge to form a belief as to the  
2 truth or falsity of the allegations in paragraph 37 and therefore they are denied in their entirety.

3           38.     Hiltbrand is without sufficient information or knowledge to form a belief as to the  
4 truth or falsity of the allegations in paragraph 38 and therefore they are denied in their entirety.

5           39.     The allegations in paragraph 39 of the Notice contain an incomplete and inaccurate  
6 statement of the facts, and are therefore denied.

7           40.     The allegations in paragraph 40 of the Notice contain an incomplete and inaccurate  
8 statement of the facts, and are therefore denied.

9           41.     The allegations in paragraph 41 of the Notice contain an incomplete and inaccurate  
10 statement of the facts, and are therefore denied.

11          42.     The allegations in paragraph 42 of the Notice contain an incomplete and inaccurate  
12 statement of the facts, and are therefore denied.

13          43.     Hiltbrand is without sufficient information or knowledge to form a belief as to the  
14 truth or falsity of the allegations in paragraph 43 and therefore they are denied in their entirety.

15          44.     Hiltbrand is without sufficient information or knowledge to form a belief as to the  
16 truth or falsity of the allegations in paragraph 44 and therefore they are denied in their entirety.

17          45.     The allegations in paragraph 45 of the Notice contain an incomplete and inaccurate  
18 statement of the facts, and are therefore denied.

19          46     The allegations in paragraph 46 of the Notice contain an incomplete and inaccurate  
20 statement of the facts, and are therefore denied.

21          47.     The allegations in paragraph 47 of the Notice contain an incomplete and inaccurate  
22 statement of the facts, and are therefore denied.

23          48.     Hiltbrand denies each and every allegation in paragraph 48.

24          49.     The allegations in paragraph 49 of the Notice contain an incomplete and inaccurate  
25 statement of the facts, and are therefore denied.

26          50.     The allegations in paragraph 50 of the Notice contain an incomplete and inaccurate  
27 statement of the facts, and are therefore denied.

56. The allegations in paragraph 56 of the Notice contain an incomplete and inaccurate statement of the facts, and are therefore denied.

**(Offer or Sale of Unregistered Securities)**

59. Hiltbrand denies each and every allegation in paragraph 59.

**(Transactions by Unregistered Dealers or Salesmen)**

60. Hiltbrand denies each and every allegation in paragraph 60.

VI.

**VIOLATION OF A.R.S. § 44-1991**

**(Fraud in Connection with the Offer or Sale of Securities)**

61. Hiltbrand denies each and every allegation in paragraph 61.
62. Hiltbrand denies each and every allegation in paragraph 62.
63. Hiltbrand denies each and every allegation in paragraph 63.
64. Hiltbrand denies each and every allegation in paragraph 64.

**AFFIRMATIVE DEFENSES**

The following affirmative defenses nullify any potential claims asserted by the Division. Hiltbrand reserves the right to amend this Answer to assert additional defenses after completion of discovery.

**First Affirmative Defense**

No violation of the Arizona Securities Act occurred because the programs at issue are not securities.

**Second Affirmative Defense**

Because the programs at issue are not securities, the Arizona Securities Division has no jurisdiction to bring this action and the action should be dismissed.

**Third Affirmative Defense**

The Division alleges that Hiltbrand is primarily liable for violations of A.R.S. §§ 44-1841 and 44-1991, the registration and anti-fraud provisions of Arizona's Securities Act. Hiltbrand, however, did not make, participate in or induce the sales of the telephone programs as required by A.R.S. § 44-2003 and cannot be primarily liable.

**Fourth Affirmative Defense**

Hiltbrand was not a control person of FMC.

**Fifth Affirmative Defense**

Hiltbrand is not jointly and severally liable as a control person to the same extent of any other Respondent because he acted in good faith and did not directly or indirectly induce the acts underlying the alleged violations.

**Sixth Affirmative Defense**

The Notice fails to state a claim upon which relief can be granted.

**Seventh Affirmative Defense**

The Division has failed to plead fraud with reasonable particularity as required by Rule 9(b) of the Arizona Rules of Civil Procedure.

**Eighth Affirmative Defense**

The Division has improperly used the "group pleading doctrine" and failed to identify any statements or conduct attributable to Hiltbrand.

**Ninth Affirmative Defense**

The purchasers of the programs at issue did not rely, reasonably or otherwise, on any alleged misrepresentation or omission of Hiltbrand.

**Tenth Affirmative Defense**

Hiltbrand did not know and in the exercise of reasonable care could not have known of any alleged untrue statements or material omissions as set forth in the Notice.

**Eleventh Affirmative Defense**

Hiltbrand did not act with the requisite scienter.

**Twelfth Affirmative Defense**

Hiltbrand did not employ a deceptive or manipulative device in connection with the purchase or sale of any security.



**Thirteenth Affirmative Defense**

Individuals purchasing the programs at issue through the other Respondents suffered no injuries or damages as a result of Hiltbrand's alleged acts.

**Fourteenth Affirmative Defense**

Violations, if any, of the Arizona Securities Act were proximately caused and contributed to by the improper conduct of intervening acts of other third persons who are not named in this action as parties.

**Fifteenth Affirmative Defense**

Purchasers of the programs at issue approved and/or authorized and/or directed all of the transactions at issue.

**Sixteenth Affirmative Defense**

Purchasers of the programs at issue relied on others and not Hiltbrand in connection with the matters at issue in the Notice.

**Seventeenth Affirmative Defense**

The Division's claims are barred by the doctrines of estoppel, waiver and/or ratification. In particular, at least one of the Respondents called the Division about one or more of the programs at issue and was told that there were no problems with it.

**Eighteenth Affirmative Defense**

The Division's claims are barred by laches and/or the statute of limitations.

**Nineteenth Affirmative Defense**

This proceeding before the Arizona Corporation Commission denies Hiltbrand essential due process and is lacking in fundamental fairness. Hiltbrand's constitutional rights will be further denied if he is not afforded trial by jury of this matter.

**Twentieth Affirmative Defense**

The Division cannot meet the applicable standards for any of the relief they are seeking in the Notice.

**Twenty-first Affirmative Defense**

Hiltbrand voluntarily withdrew from the relevant activity.

**Twenty-second Affirmative Defense**

A.R.S. § 44-2031(c) is unlawful and unconstitutional and must be overturned.

**Twenty-third Affirmative Defense**

The Commissions is without authority to order Hiltbrand repay anything beyond the commissions he earned.

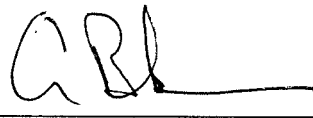
**Twenty-fourth Affirmative Defense**

Hiltbrand alleges such other affirmative defenses set forth in the Arizona Rules of Civil Procedure 8(c) as may be determined to be applicable during discovery.

BADE & BASKIN PLC  
80 EAST RIO SALADO PARKWAY  
SUITE 515  
TEMPE, ARIZONA 85281  
TELEPHONE: 480-968-1225  
FACSIMILE: 480-968-6255

1 RESPECTFULLY SUBMITTED this 11th day of June, 2004.

2 BADE & BASKIN PLC

3  
4 By 

5 Alan S. Baskin  
6 80 East Rio Salado Parkway, Suite 515  
7 Tempe, Arizona 85281

8 Attorneys for Respondents Stephen A. and  
9 Cheryl Hiltbrand

10 ORIGINAL and thirteen copies of the foregoing  
11 hand-delivered this 11th day of June, 2004 to:

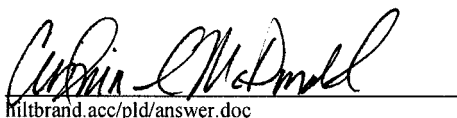
12 Docket Control  
13 Arizona Corporation Commission  
14 1200 West Washington Street  
15 Phoenix, AZ 85007

16 COPY of the foregoing hand-delivered  
17 this 11th day of June, 2004 to:

18 Matt Neubert  
19 Director of Securities  
20 Securities Division  
21 Arizona Corporation Commission  
22 1300 W. Washington Street  
23 Phoenix, AZ 85007

24 COPY of the foregoing mailed  
25 this 11th day of June, 2004 to:

26 Mark Dinell  
27 Securities Division  
Arizona Corporation Commission  
1300 W. Washington, 3<sup>rd</sup> Floor  
Phoenix, AZ 85007

  
hiltbrand.acc/pld/answer.doc